
In The
Supreme Court of the United States
October Term, 1977

No. 77-809

VERNON LEE JOE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION
TO GRANT OF CERTIORARI

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**RESPONDENT'S BRIEF IN OPPOSITION
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OPINION BELOW

There is no reported opinion of the Supreme Court of Virginia. The order rejecting the petition for writ of certiorari is set forth in petitioner's Appendix A.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

- I. Did The Trial Court Err In Overruling The Petitioner's Motion To Quash The Indictment At Trial Under Which The Petitioner Was Convicted?
- II. Did The Governor Have The Power To Commute The Petitioner's Sentence Of Death To Life In The Penitentiary Prior To The Trial Court's Pronouncement Of Judgment On The Jury's Verdict?

STATEMENT OF THE CASE

The respondent accepts the petitioner's statement of the case.

ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

- I. The Court Did Not Err In Overruling The Petitioner's Motion To Quash The Indictment.

Petitioner has argued that the trial court should have quashed the indictment because the statute under which the petitioner was tried was unconstitutional. The petitioner states that after the verdict of the jury but prior to petitioner's sentencing this Court rendered five decisions: *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Williams v. Oklahoma*, 428 U.S. 907 (1976); and *Woodson v. North Carolina*, 428 U.S. 280 (1976), which hold that statutes requiring mandatory death penalty for enumerated offenses are unconstitutional without proper guidelines for the sentencing authority. However, the respondent states that the holdings in the above cases did not *ipso facto* invalidate the petitioner's sentence nor do the holdings declare Virginia's statute unconstitutional. It may be that Virginia's statute would have been declared unconstitutional upon ap-

plication to the proper court. This was discussed by the Virginia Supreme Court in *Lewis v. Commonwealth*, 218 Va. 31, 37, S.E.2d (1977), when a similar issue was raised. Under Virginia law at the time this case was tried the statute in question had been held to be constitutional. See *Jefferson v. Commonwealth*, 214 Va. 747, 204 S.E.2d 58 (1974), and *Washington v. Commonwealth*, 216 Va. 185, 217 S.E.2d 815 (1975). Assuming, for the sake of argument only, that the sentencing portion of § 53-251 is unconstitutional, this was cured by the subsequent commutation of the sentence to life in prison by the governor. At the time petitioner was tried, the court correctly overruled the petitioner's motion to quash the indictment.

- II. The Governor Had The Power To Commute The Petitioner's Sentence Of Death To Life In The Penitentiary Prior To The Court's Pronouncement Of Judgment On The Jury's Verdict.

The petitioner alleges error in the procedure followed by the trial court and the governor. The jury had convicted the petitioner of the offenses charged and rendered its verdict of death. The court took motions of the petitioner under advisement. In the interim the governor commuted the petitioner's sentence of death to life in prison.

The respondent states that the procedure followed in this case is purely a matter of State law. It is submitted that this Court should adhere to its decision in *Rose v. Hodges*, 423 U.S. 19, *reh. den.*, 423 U.S. 1092 (1975), where the Court held:

"If Tennessee chooses to allow the governor to reduce the death penalty to a term of years without resort to further judicial proceedings, the United States Constitution affords no impediment to that choice." 423 U.S. at 22.

In *Lewis v. Commonwealth, supra*, the court upheld the governor's decision to commute the death sentence of a convicted murderer in facts almost identical to the case at bar. The only difference was the trial court had pronounced judgment on the jury verdict. Whether the court had pronounced judgment on the jury verdict, however, is immaterial under Virginia's Constitution. In Virginia, the governor's authority to grant commutations arises from Article V, § 12 of the Constitution of Virginia (1971). The Governor of Virginia can commute a death sentence after conviction. The word "conviction" is necessarily given the "ordinary legal meaning" i.e., "not that judgment has been entered or sentence pronounced, but only that a verdict of guilt has been returned." *Smith v. Commonwealth*, 134 Va. 589, 595, 113 S.E. 707 (1922).

Texas has also upheld the commutation of a death sentence by a governor under facts similar to those in *Rose v. Hodges, supra*. *Whan v. State*, 485 S.W.2d 275 (Texas 1972), *cert. den.*, 411 U.S. 934 (1973). In *Whan*, the Texas court stated that the governor can commute a death sentence after the conviction, but before sentence has been imposed, 485 S.W.2d at 277 (dictum).

The respondent contends that the petitioner is not under a sentence of death where the sentence has been commuted to life in prison by the governor. The petitioner's commuted sentence, life in prison, is the only sentence to be considered. See *Bowen v. State*, 488 S.W.2d 373, 375-376 (Tenn. 1972). Since the sentence suffered by the petitioner is not violative of the standards set forth in *Roberts, Jurek, Williams, Woodson*, and *Gregg*, the respondent submits that the petition for certiorari should be denied.

The respondent states that similar issues to the issues raised in the case at bar were raised in the petition for

certiorari of Edward Alien Gooch, III, Record No. 77-468. This Court denied the petition on November 28, 1977. See Appendix A for copy of Court order.

CONCLUSION

For the foregoing reasons, the respondent respectfully submits that this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General of Virginia

THOMAS D. BAGWELL
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

This is to certify that I, Thomas D. Bagwell, Assistant Attorney General of Virginia, and a member of the Bar of the Supreme Court of the United States, on the 22nd day of February, 1978, mailed with first class postage prepaid a true copy of this Respondent's Brief in Opposition to Grant of Certiorari to Richard George Brydges, Esquire, 1369 Laskin Road, Virginia Beach, Virginia, 23451.

THOMAS D. BAGWELL
Assistant Attorney General

APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

November 28, 1977

ANTHONY F. TROY, Esq.
Attorney General of Virginia
Supreme Court-Library Bldg.
Richmond, Va. 23219

RE: Edwin Allen Gooch, III
v. Virginia
No. 77-468

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Mr. Justice Blackmun took no part in the consideration or decision of this petition.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ VIRGINIA M. GIBSON
Assistant Clerk